IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS J. BURNS,	:	
Plaintiff	:	
	:	
v.	:	**CIVIL ACTION**
	:	**NO. 01-7019**
LAVENDER HILL HERB FARM, INC. et al.,	:	
Defendants	:	

MEMORANDUM OPINION AND ORDER

RUFE, J. **April 28, 2005**

Pro se Plaintiff Thomas J. Burns, a Delaware resident and former employee of Defendant Lavender Hill Herb Farm, Inc., brought this action asserting numerous federal and state causes of action, including violations of the Sherman Antitrust Act and the Racketeer Influenced and Corrupt Organization Act ("RICO"). On October 30, 2002, this Court granted Defendants' motions to dismiss the Complaint, finding that Burns failed to allege a legally recognizable injury and therefore lacked standing to assert antitrust and RICO claims.

On November 19, 2002, Burns filed his Amended Complaint, re-asserting claims based on the Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (Count 1); RICO, 18 U.S.C. §§ 1961-68 (Counts 2-7); Abuse of Process (Counts 8-9); Trade Libel and Interference with Business Relationship (Counts 10-12); Civil Conspiracy (Count 13); Conversion (Count 14); Fraudulent Concealment (Count 15); and Assault and Battery (Count 16).[1] After a long and contentious discovery process, all parties filed motions for summary judgment, which are presently pending

[1] The original Complaint alleged violations of the False Claims Act ("FCA"), the Sherman Act, RICO, and state law. This Court dismissed Burns' FCA claims with prejudice for failure to follow the requisite statutory procedures for service and filing. Burns v. Lavender Hill Herb Farm, Inc., No. Civ. A. 01-CV-7019, 2002 WL 31513418, at *6 (E.D. Pa. Oct. 30, 2002).

before the Court.

This Court has federal question jurisdiction in this case under 28 U.S.C. § 1331. The following Defendants remain[2]:

- Lavender Hill Herb Farm, Inc. ("Lavender"), a company engaged in the business of selling organic produce;
- Pennsylvania Certified Organic ("PCO"), a company engaged in the business of inspecting and certifying organic farms and produce;
- Marjorie S. Lamb, sole shareholder of Lavender and Burns' ex-wife;
- Kathryn Elizabeth Lamb, employee of Lavender, and sister of Marjorie Lamb;
- Helen Nicholson Lamb, owner of real property leased to Lavender, and mother of Marjorie and Kathryn Lamb;
- Leslie Zuck, executive director of PCO (together with PCO, the "PCO Defendants").

Burns alleges that he was the sole owner and founder of Lavender. He claims that he incorporated Lavender early in 1997, and that Marjorie Lamb illegally transferred all shares in Lavender to herself by filing a second certificate of incorporation in May of 1997. Burns also claims that Defendants Marjorie, Kathryn, and Helen Lamb (collectively, the "Lambs") operated "a similar business as an unincorporated partnership." During 1999 and the first week of January 2000 the Lambs allegedly defrauded customers by purchasing conventional herbs and flowers from Pennsylvania vendors, repackaging the items, and labeling them "certified organic." Burns claims that he discovered this fraud in January of 2000 and contacted PCO and other federal and state agencies to report it.

[2] This Court previously dismissed Burns' claims against his ex-wife's attorney and her law firm with prejudice for lack of personal jurisdiction and lack of venue. See Burns, 2002 WL 31513418, at *4-5.

Burns alleges that the PCO Defendants conspired with the Lambs to cover up the misbranding scheme and made false statements to the Pennsylvania Department of Agriculture and the Delaware Department of Justice about their knowledge and/or involvement in this fraud. He claims that shortly after he reported the fraud, PCO ceased certifying Burns' business and started certifying the business run by the Lambs, causing Burns' business to fail and allowing Defendants to reap greater profits than their competitors, including Burns.

Defendants categorically deny Burns' allegations. According to Marjorie Lamb, she met Burns after she started Lavender as a sole proprietorship in 1989, married him in 1993, and employed him as a part-time delivery person. Marjorie Lamb incorporated Lavender in 1997. In July of 2000 she and Burns divorced, and under the divorce agreement, she retained full ownership and control over Lavender. After the divorce, Burns began making allegations similar to those in his Complaint to various authorities, including the Delaware Department of Justice, which rejected these allegations. Defendants also dispute the authenticity of several documents submitted by Burns as evidence and claim that he is perpetuating a fraud upon this Court.

I. DEFENDANTS' SUMMARY JUDGMENT MOTIONS

The Lambs and the PCO Defendants filed separate motions for summary judgment on all counts, incorporating each other's arguments. The overarching argument made by all Defendants is that Burns failed to produce any evidence in support of any of his outrageous claims and thus failed to establish a *prima facie* case on any claim.[3] Defendants are correct.

[3] The well-known standard of review for a summary judgment motion applies here. Under Federal Rule of Civil Procedure 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." To avoid summary judgment, disputes must be both 1) material, meaning concerning facts that are relevant and necessary and that might affect the outcome of the action under governing law, and 2) genuine, meaning the evidence must be such that a reasonable jury could

A. Antitrust Standing

In Count 1, Burns alleges that Defendants engaged in an unlawful conspiracy to unreasonably restrain and monopolize "interstate commerce in certified organic food standards, production, and sales" in violation of the Sherman Act, 15 U.S.C. §§ 1-2.[4]

Defendants challenge Burns' standing to bring this antitrust claim. The first step in determining whether a plaintiff has antitrust standing is to analyze "whether the plaintiff suffered an antitrust injury."[5] If there is no antitrust injury, that is the end of the inquiry, and the claim should be dismissed.[6]

An antitrust injury is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the

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return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). When deciding a motion for summary judgment, all facts must be viewed and all reasonable inferences must be drawn in favor of the nonmoving party. Matsushita Elec. Indus. Co., Ltd., 475 U.S. at 587.

The party seeking summary judgment bears the initial burden of showing a basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party can meet its burden "simply by 'showing' - that is, pointing out to the district court - that there is an absence of evidence to support the non-moving party's case." Id. at 325. Once the moving party has met its initial burden, the adverse party's response, by affidavits or otherwise as provided in Federal Rule of Civil Procedure 56(c), must set forth specific facts showing that there is a genuine issue for trial. Summary judgment should be granted if the non-moving party fails to make a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

[4] See Am. Complaint ¶¶62-64.

[5] City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 265 (3d Cir. 1998).

[6] See id.

violation."[7] In addition, such injury must be causally related to the defendants' allegedly anti-competitive activity. The Third Circuit has "consistently held an individual plaintiff personally aggrieved by an alleged anti-competitive agreement has not suffered an antitrust injury unless the activity has a wider impact on the competitive market."[8] Burns fails to present evidence of an injury "of the type the antitrust laws were intended to prevent."[9] Burns alleges that Defendants' antitrust conspiracy caused him to lose his business. This alleged injury is of the type the antitrust laws were meant to address, when the injury is directly related to "a conspiracy to exclude [the plaintiff] from the relevant market."[10] Burns' Amended Complaint also contains unspecified allegations of injury to the price and supply of organic foods.

It is undisputed that Marjorie Lamb owns Lavender. Nonetheless, Burns claims that the Marjorie Lamb took Lavender from him when she filed a corrected certificate of incorporation for Lavender in May of 1997, listing herself as the registered owner and agent.[11] However, this certificate reflects that Marjorie Lamb filed it only to correct the name of the registered agent for Lavender. Dated May 21, 1997, it lists Marjorie Burns as the registered agent and president of Lavender, without indicating any changes in the ownership. Burns presents absolutely no evidence

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[7] Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 489 (1977); Eichorn v. AT&T Corp., 248 F.3d 131, 140 (3d Cir. 2001).

[8] Eichorn, 248 F.3d at 140.

[9] Brunswick, 429 U.S. at 489.

[10] Angelico v. Lehigh Valley Hospital, Inc., 184 F.3d 268, 274-75 (3d Cir. 1999) ("loss of income due to inability to practice in the relevant market area" is of a type the antitrust laws were meant to address.)

[11] See Ex. F to Plaintiff's Response to Lavender's Motion to Dismiss.

supporting his claim that he owned Lavender at the time of its incorporation in 1997.[12]

Substantial evidence reveals that Burns simply worked for the Lambs as a Lavender employee. On May 18, 2000, Burns wrote a complaint to Leslie Zuck, representing that he was the "produce buyer, delivery person, and bookkeeper" for Lavender.[13] In his deposition, Burns testified that the Lambs took over his business by "banning him from the property" and that he left "involuntarily" because the Lambs "made it clear that they did not want [him] to be there."[14] Admitting that he has no evidence showing how Lavender and its assets were "transferred" to Marjorie Lamb, Burns curiously claims that it is Marjorie Lamb's burden to prove how she obtained the property in question.[15]

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[12] Burns relies on unverified joint tax returns for years 1993, 1994, and 1995, listing him as the sole proprietor of Lavender. Marjorie Lamb submitted a sworn affidavit stating that she started Lavender in 1989, and that in 1993 she filed a joint tax return with Burns, listing him as the sole proprietor because she had no knowledge of tax laws at that point, and Burns represented that he had numerous years of experience as a tax preparer. Marjorie Lamb's affidavit also asserts that in 1994 and 1995, after being audited by the IRS, she filed joint tax returns listing herself as the sole proprietor, and that the copies submitted by Burns are forgeries. Even if Burns' tax returns are given any credence, they are irrelevant because Burns does not present any evidence supporting his claim that he incorporated Lavender as his own business and thereafter Marjorie Lamb unlawfully transferred ownership to herself.

For example, when asked whether he ever had a certificate of incorporation for Lavender listing him as the incorporator, Burns testified "I don't recall." 7/18/03 N.T. 8:9-12. When asked whether he was a shareholder at the time of incorporation, Burns testified that he was, that he owned "roughly half" of the shares, then immediately claimed that "no stock was issued" and that he did not own any stock. Id. at 8:13-24. He testified that he did not have an official position in the company because "there was never any listing of officers." Id. at 10:18-19. He also testified that Marjorie Lamb "may have been" listed as a co-incorporator with him. Id. at 11:4-6. When questioned as to whether in 1997 he submitted any of the permits required to operate this business, Burns testified that he does not recall who submitted those because "[i]t was a joint operation." Id. at 15:11-16.

[13] Ex. R to Plaintiff's Response to PCO's Motion for Summary Judgment.

[14] 7/18/03 N.T. at 159:5-6; 207:5-21.

[15] As detailed in this Court's Memorandum Opinion dated February 2, 2005, the parties' divorce was finalized by the court's acceptance of the parties' Stipulated Agreement dated November 22, 2000, in Lamb v. Burns, No. CN00-06046, in the Family Court of the State of Delaware (the "Stipulation"). After the Family Court held Burns to be in contempt of a child support order, Burns appealed, arguing that his signature on the Stipulation was forged and that the Family Court judge illegally transferred a Pennsylvania grower's license from him to his ex-wife Marjorie Lamb. The Delaware Supreme Court affirmed the Family Court's decision and found that there was "no factual support in the record for any of Burns' other claims." Burns v. Lamb, No. 573, 2003, 860 A.2d 809

Burns also alleges that he lost his business because the PCO Defendants, in an attempt to conceal alleged consumer fraud by the Lambs, revoked his license to market organic produce. Burns does not offer any evidence to support his claim that he actually had such a license at any point in time. His complaints to Zuck stated that Lavender held the organic grower certification.[16] Moreover, Burns testified that the PCO Defendants refused to proceed with his application for a license in 2000 because of an order issued by the Family Court of Delaware prohibiting Burns from contacting Lavender's customers and licensing agencies, including PCO, and claiming that Lavender sold misbranded non-organic produce.[17] Quite simply, Burns offers no evidence of his alleged injuries, or of any acts by Defendants that injured him. Therefore, Burns lacks antitrust standing.

(Del. June 7, 2004).

This Court's February 2, 2005 Opinion found that Burns was collaterally estopped from relitigating the issues decided by the Delaware state courts. Among those issues is the division of property between Burns and Marjorie Lamb pursuant to the terms of their divorce. The Stipulation specifically states that "[Marjorie Lamb] shall continue to be the sole owner and operator of the business known as the Lavender Hill Herb Farm, Inc. [Marjorie Lamb] shall hold [Burns] harmless with respect to any debts associated with the business. [Burns] waives any and all claims to an interest in the business he may have asserted in Family Court including, but not limited to, marital, legal or equitable interest in said business."

A judgment that results from the parties' stipulation of settlement "does not detract from its being considered a conclusive determination of the merits of that action for purposes of collateral estoppel where [] it is clear that the parties intended the stipulation of settlement and judgment entered thereon to adjudicate once and for all the issues raised in that action." Green v. Ancora-Citronelle Corp., 577 F.2d 1380, 1383 (9th Cir. 1978). The Stipulation stated that Burns and Marjorie Lamb "intend, by means of this agreement, to compromise, adjust and settle all issues relating to the property division. . ." The Delaware courts entered several judgments based on the Stipulation, as set forth in the Court's February 2, 2005 Opinion. These include judgments finding Burns in violation of the Stipulation's child support obligations and judgments rejecting Burns' claim that his signature on the Stipulation was forged. A "judgment on an agreed statement of facts is a judgment on the merits" and is binding "with respect to the same matter arising in the subsequent litigation." Fairmont Aluminum Co. v. Commissioner of Internal Revenue, 222 F.2d 622, 625 (4th Cir. 1955). Therefore, Burns is collaterally estopped from relitigating the issue of Lavender's ownership or of any interest he may have in the business. However, as detailed above, Burns' claims of interest in Lavender fail even if the Court were to ignore the Stipulation, since Burns does not offer any evidence supporting his allegations that Marjorie Lamb illegally transferred ownership of Lavender to herself.

[16] See Ex. R to Plaintiff's Response to PCO's Motion for Summary Judgment.

[17] 7/18/03 N.T. 246-47, 251.

B. Section 1 of the Sherman Act

Defendants also argue that Burns fails to establish the elements of a cause of action under either Sections 1 and 2 of the Sherman Act. Section 1 prohibits "contracts, combinations or conspiracies in restraint of trade."[18] To sustain a cause of action under Section 1 of the Sherman Act, "the plaintiff must prove (1) that the defendants contracted, combined, or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of that conspiracy."[19]

Burns argues that Lavender's business records show the terms of the conspiracy and refers the Court to several pages of photocopied receipts and invoices for produce allegedly bought by "the enterprise" in 1998 from different Pennsylvania produce vendors.[20] These receipts provide absolutely no support for Burns' claims that Defendants were buying conventional produce, re-labeling it as organic, and re-selling it at higher prices.[21] Burns does not offer any proof of the

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[18] 15 U.S.C. § 1.

[19] Martin B. Glauser Dodge Co. v. Chrysler Corp., 570 F.2d 72, 81 (3d Cir. 1977).

[20] Ex. P to Plaintiff's Response to Lambs' Motion for Summary Judgment.

[21] Burns relies on other unverified documents, including a letter allegedly written by Marjorie Burns to Honorable Judge Conner of the Family Court of Delaware. (Ex. J to Plaintiff's Response to Lambs' Motion for Summary Judgment.) As stated in this Court's February 2, 2005 Opinion, the Delaware Courts found this document, along with several others, to be a forgery, and found Burns' claims that Judge Conner was/is the Lambs' business associate to be without any factual support.

Burns also submits a letter dated January 2, 2000, allegedly written by Zuck to Marjorie and Helen Lamb, stating that "PCO is certifying conventional as organic." (Ex. T to Plaintiff's Response to Lambs' Motion for Summary Judgment.) The PCO Defendants present an affidavit executed by Zuck, stating that the signature on the letter is not hers and that the letter is a forgery. (Ex. A to PCO Defendants' Reply to Plaintiff's Response.) The PCO Defendants filed a Motion to Strike Burns' Exhibit T or, in the alternative, to hold a Rule 104 hearing to determine its authenticity (they also raised this issue in their earlier Reply to Plaintiff's Response to their Motion for

alleged agreement to restrain competition or any evidence from which the Court could infer such an agreement.[22]

Further, aside from Burns' conclusory allegations that Defendants charge higher prices for conventional produce labeled as organic, Burns fails to present any evidence of adverse,

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Summary Judgment). The PCO Defendants claim that discovery sanctions in the form of exclusion of evidence are proper because Burns did not produce this document in discovery and failed to articulate any reason for his failure to make required disclosures. Fed. R. Civ. P. 37(b)(2)(C) (the court may sanction a party for failure to comply with orders to provide or permit discovery by striking pleadings or parts thereof, dismissing the action or part thereof), Fed. R. Civ. P. 37(c)(1) (the court may exclude evidence that a party failed to disclose pursuant to Rule 26(a) and 26(e)(1)-(2), without substantial justification, unless the failure is harmless). The PCO Defendants list numerous other instances of Burns' non-compliance with discovery rules and this Court's Orders, including Burns' failure to appear for Court-ordered depositions.

Burns' failure to produce this document earlier (or, for that matter, any documents responsive to the PCO Defendants' requests for documents, in violation of this Court's order, until January of 2005) is indeed unjustified and not harmless. Burns filed a Motion to Enlarge the Time to Respond to PCO's Motion for a Rule 104 Hearing, but he summarizes the PCO Defendants' Motion as alleging a fabrication of "certain documents allegedly prepared by the accountant for Lavender." Burns claims that the PCO Defendants refused to reveal the name of this accountant during the extended discovery period ordered by this Court, which ended on January 15, 2005. It is entirely unclear which documents or statements Burns is referencing. The PCO Defendants' Motion to Strike Burns' Exhibit T unambiguously states that the fabrication alleged is Zuck's signature on the letter dated January 2, 2000. Burns completely fails to address his belated production of Exhibit T, allegedly written by Zuck and not by an accountant, and the issue of its forgery. He did not try to depose Zuck during the extended discovery period to authenticate Exhibit T (Burns, in a Request for Extension to Respond to PCO Defendants' Motion, claims that he needs to depose the unidentified "accountant"). The PCO Defendants already have been prejudiced by Burns' belated production of Exhibit T, having had to file several motions to strike it and to determine its authenticity. When the PCO Defendants attempted to cure this prejudice by deposing Burns on December 2, 2004, he claimed that he did not have his reading glasses and could not read Exhibit T (or any other documents), testified that he drove to the deposition, that he might have been driving "illegally," and then stated that his driver's license does not indicate that he needs glasses. See Ex. A to PCO Defendants' Motion for a Rule 104 Hearing., 12/02/04 N.T. at 33-41; see also Nicholas v. Pennsylvania State Univ., 227 F.3d 133 (3d Cir. 2000) (affirming district court's grant of motion for discovery sanctions based on party's failure to supplement disclosure). Given Burns' flagrant disregard of the Federal Rules of Civil Procedure and this Court's orders, and the resulting prejudice to the PCO Defendants, the Court grants the PCO Defendants' Motion to Strike Burns' Exhibit T.

Pursuant to Rule 37(c)(1), the Court, "after affording an opportunity to be heard," may impose alternative sanctions for failure to comply with discovery rules, including payment of reasonable expenses. Fed. R. Civ. P. 37(c)(1). The PCO Defendants request leave to file a motion seeking attorney fees and costs for bringing their Motion to Strike. The Court grants this request and will give Burns an opportunity to respond.

[22] See DM Research, Inc. v. Coll. of Am. Pathologists, 170 F.3d 53, 56 (3d Cir. 1999) (affirming dismissal of the plaintiff's antitrust claims even though the plaintiff alleged an illegal agreement between independent actors to restrain competition, where the conspiracy would be highly implausible and the plaintiff failed to identify a written agreement or a basis for inferring a tacit agreement). As in DM, the lack of specific (or any) evidence produced by Burns renders highly implausible his allegation that a licensing organization would conspire with an organic produce business to certify conventional produce as organic. Even taking Burns' allegations that the PCO Defendants also grow organic produce at face value, the alleged conspiracy simply does not make sense.

anti-competitive effects of the alleged conspiracy within relevant product and geographic markets. The "relevant product market" is defined as those commodities reasonably interchangeable by consumers for same purposes, and factors to be considered in determining the relevant product market include price, use and qualities.[23] Burns' claims that certified organic herbs and flowers are the relevant product rely on nothing but Burns' bare allegations that Defendants' (and supposedly his own) customers would not have purchased conventional produce. Burns fails to even allege the relevant geographic market.[24] He also presents no evidence of the actual anti-competitive effects of the alleged conspiracy or of Defendants' market power.[25] "An antitrust plaintiff must prove that challenged conduct affected the prices, quantity or quality 'of goods or services.'"[26] Burns presents no such evidence and therefore fails to show that Defendants caused an unreasonable restraint of trade that implicated an injury to competition in violation of Section 1 of the Sherman Act.

C. Section 2 of the Sherman Act

Section 2 of the Sherman Act provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person ... to monopolize any part of the trade" is guilty of an offense and subject to penalties.[27] "A violation of Section 2 consists of

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[23] Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 722 (3d Cir.1991).

[24] The plaintiff who alleges conspiracy in restraint of trade bears the evidentiary burden of proving a relevant geographic market, "comprised of the area where his customers would look to buy such a product." Id.

[25] Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1367 (3d Cir. 1996) (the plaintiff may satisfy the second element by proving the existence of actual anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods and services, or by proof of the defendant's 'market power,' i.e. the ability to raise prices above those that would prevail in a competitive market).

[26] Tunis Bros., 952 F.2d at 728.

[27] 15 U.S.C. § 2.

two elements: (1) possession of monopoly power and (2) maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[28] Monopoly power under Section 2 "requires something greater than market power under Section 1," and "has been defined as the ability to control prices or exclude competition."[29] The existence of monopoly power may also "be inferred from a predominant share of the market and the size of that portion is a primary factor in determining whether power exists."[30]

Burns fails to offer any evidence of Defendants' monopoly power or their share of the market, relying on his bare allegations that Defendants have acquired monopoly power.[31] As discussed above, Burns failed to offer any evidence of the alleged conspiracy. Burns also failed to even allege the relevant product market.[32] Therefore, Burns' claim that Defendants conspired to acquire or attempted to acquire a monopoly fails as a matter of law.[33] Accordingly, the Court dismisses Count 1 of the Amended Complaint with prejudice.

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[28] United States v. Dentsply Int'l., Inc., 399 F.3d 181, 186 (3d Cir. 2005) (citations omitted).

[29] Id. at 187.

[30] Id.

[31] Burns once again cites to his Exhibit T (which Defendants claim is a forgery), which gives bare numbers of "sales" for "Lavender Hill Herb Farm," "Lavender Hill Herb Farm, Inc.," and "PCO," "as of 10/31/99." These numbers, even if accepted by the Court as admissible evidence, are not proof of Defendants' monopoly power or their market share.

[32] See Rolite, Inc. v. Wheelabrator Envtl. Sys., 958 F.Supp. 992, 996 (E.D. Pa. 1997) (allegations of a relevant product market are required to plead a claim of monopolization, attempted monopolization and conspiracy to monopolize under Section 2).

[33] See Barr Labs. v. Abbott Labs., 978 F.2d 98, 112 (3d Cir. 1992) ("to establish a claim of attempted monopolization, a plaintiff must show that the defendant (1) had specific intent to monopolize the relevant market, (2) engaged in anti-competitive or exclusionary conduct, and (3) possessed sufficient market power to come dangerously close to success."). Burns has not even alleged other factors considered by the courts in determining whether an attempt at monopolization exists. See id. (such factors "include the strength of competition, probable development of the industry, the barriers to entry, the nature of the anti-competitive conduct, and the elasticity of consumer demand."). Instead, Burns alleges that "the demand for organic food is so great that a dealer can virtually sell all that he can market." Am. Compl. ¶ 52.

D. RICO Standing

In Counts 2 and 4, Burns alleges that Defendants participated in a "scheme to misbrand and mislabel produce," and "to obstruct justice to conceal and continue the operation of the fraudulent mislabeling scheme" in violation of RICO.[34] In Count 3, Burns alleges that the Lambs seized control of Lavender from him through unlawful means.[35] In Counts 5 through 7, Burns alleges that the Lambs and Marjorie Lamb's former attorney[36] engaged in transportation fraud and obstruction of justice by removing and destroying records relating to his business and Defendants' alleged misbranding scheme.[37]

RICO makes it unlawful to acquire or maintain control of an enterprise through a pattern of criminal activity, or to use such an enterprise to engage in a pattern of criminal activity, or to conspire to perform these acts.[38] Although RICO is primarily a criminal statute, it provides a civil remedy for any person "injured in his business or property by reason of" a RICO violation.[39]

To have standing to bring a claim under RICO, a plaintiff must prove injury to "business or property,"[40] and this injury must be specific or quantifiable.[41] This Court previously

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[34] See Am. Compl. ¶¶ 74-87, 94-99; 18 U.S.C. §§ 1962(c)-(d).

[35] See Am. Compl. ¶¶ 88-93; 18 U.S.C. § 1962(b).

[36] Despite this Court's dismissal with prejudice of Burns' claims against Suzanne Seubert, the attorney who represented Marjorie Lamb in the divorce proceedings, Burns did not delete his claims against her from the Amended Complaint. See id. ¶¶104-138.

[37] Id. ¶¶ 100-28.

[38] 18 U.S.C. §§ 1962(b)-(d); Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 789 (3d Cir. 1984).

[39] 18 U.S.C. §1964(c).

[40] Id.; see also Sedima, S.P.R.I. v. Imrex Co., 473 U.S. 479, 496 (1985) ("plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the

dismissed Burns' RICO claims because he failed to allege a specific or quantifiable injury. Burns once again fails to offer required proof of an injury. As discussed previously, while Burns alleges that Lavender was unlawfully taken away from him and that he lost his business as a result of PCO's failure to renew his certification, he fails to offer any evidence supporting these claims. A vague claim of injury which does not show actual, out-of-pocket loss, does not satisfy RICO requirements.[42] Accordingly, Burns does not have standing under RICO and fails to state a claim for which relief can be granted. The Court dismisses Burns' RICO claims with prejudice.

E. State Law Claims

Counts 8 through 16 are state law claims that, in the absence of a federal question in the case, may be dismissed for lack of jurisdiction. These counts include Abuse of Process (Counts 8-9); Trade Libel and Interference with Business Relationship (Counts 10-12); Civil Conspiracy (Count 13); Conversion (Count 14); Fraudulent Concealment (Count 15); and Assault and Battery (Count 16).

Federal courts may exercise supplemental jurisdiction over pendent state law claims if they possess original jurisdiction over federal claims brought under a common nucleus of operative facts.[43] A district court has discretion to exercise supplemental jurisdiction following the dismissal

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violation").

[41] See Maio v. Aetna, Inc., 221 F.3d 472, 495 (3d Cir. 2000).

[42] Id.; see also Wolk v. United States, No. 00-CV-6394, 2001 WL 1735258, at *5 (E.D. Pa. Oct. 25, 2001) (where plaintiff contended only that he lost "large sums of income," such claims of injury were "vague and highly speculative," warranting dismissal), aff'd, 2002 WL 1815901 (3d Cir. Aug. 8, 2002); Browne v. Abdelhak, No. 98-CV-6688, 2000 WL 1201889, at *4 (E.D. Pa. Aug. 23, 2000) (dismissing RICO claims for lack of standing where plaintiffs failed to allege any injury to business or property interest).

[43] See United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

of all federal claims.[44] Where "the claim over which the district court has original jurisdiction is dismissed before trial, the district court *must decline* to decide the pendent state law claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so."[45]

Here, Burns has not presented any evidence showing that judicial economy, convenience, or fairness would suffer if this Court were to dismiss with prejudice his pendent state law claims, nor does there appear to be any. This Court has previously dismissed these claims without prejudice, and Burns' failure to present any evidence in support of any of his claims makes it clear that they are frivolous.

Counts 8 and 9 of the Amended Complaint are claims of abuse of process directed against Marjorie Lamb.[46] Count 8 alleges that she filed false affidavits in the Family Court of Delaware, and Count 9 alleges that she used the Family Court of Delaware to obtain and destroy documents incriminating her in the misbranding scheme. Burns presents no evidence of allegedly false documents filed by Marjorie Lamb in the Family Court of Delaware, and no proof of what documents she allegedly destroyed.[47]

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[44] 28 U.S.C. § 1367(c)(3).

[45] Borough of W. Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir. 1995) (emphasis added); see also Hedges v. Musco, 204 F.3d 109, 123 (3d Cir. 2000) (same).

[46] These Counts also list Suzanne Seubert as a Defendant, but as explained supra, this Court has already dismissed with prejudice all of Burns' claims against Ms. Seubert.

[47] In his Response to Defendants' Motion for Summary Judgment on these claims, Burns reiterates the claims of his signature being forged on the Stipulation filed in the Family Court of Delaware, which claims were rejected by the Supreme Court of Delaware, as detailed in this Court's February 2, 2005 Opinion. Burns also refers the Court to an affidavit executed by Marjorie Lamb on July 27, 2004, almost two years after Burns filed his Amended Complaint, and to allegedly false affidavits of residency filed by Helen and Kathryn Lamb with this Court in September of 2003. These documents do not support Burns' allegations of abuse of process.

Counts 10 through 12 are claims of trade libel and interference with business relationship. Burns alleges that in March and November of 2000 the Lambs made disparaging statements to Zuck, PCO, and two customers of Burns' "business," claiming, *inter alia*, that Burns was not the owner or even employee of any "organic produce business" and that he was making false accusations against Lavender. Burns alleges that as a result of these statements PCO and the two customers stopped doing business with him. Trade libel, or the tort of commercial disparagement, "is actionable where: (1) the statement is false; (2) the publisher either intends the publication to cause pecuniary loss or reasonably should recognize that publication will result in pecuniary loss; (3) pecuniary loss does in fact result; and (4) the publisher either knows that the statement is false or acts in reckless disregard of its truth or falsity."[48] Burns does not present any evidence of actual pecuniary loss, and, in fact, fails to present evidence of having an organic produce business in 2000, when Marjorie Lamb allegedly made the defamatory statements.

In Count 13 Burns claims that Defendants engaged in a civil conspiracy to defraud customers by misbranding produce, and to violate federal laws and obstruct justice. Count 14 is Burns' claim that Marjorie Lamb unlawfully converted Lavender's stock into her own name by filing false documents with the Delaware authorities in 1997. Count 15 is the claim of fraudulent concealment, with Burns requesting an accounting for the goods, money, and services he allegedly continued to provide to Lavender after it was "secretly converted to defendants." As described above, Burns fails to present evidence of any of these acts, including the alleged misbranding, the conspiracy, unlawful conversion of Lavender's ownership, or of the goods and services he allegedly

[48] See Pro Gulf Mfg. v. Tribune Review Newspaper, 761 A.2d 553, 556 (Pa. Super. 2000), rev'd on other grounds, 809 A.2d 243 (Pa. 2002).

provided to Lavender after its incorporation.[49]

Count 16 is Burns' claim of assault and battery as a result of consuming Defendants' "misbranded flowers." Not only does Burns not allege any elements of these claims, including any resulting damage, but he also now argues that these claims may not be ripe for litigation "since the effects of pesticide poisoning are long term."

For the aforementioned reasons, the Court dismisses Counts 8-16 of the Amended Complaint with prejudice.

II. DISCOVERY MOTIONS

On November 12, 2004, this Court granted the PCO Defendants' Motion to Extend Discovery for sixty days. The PCO Defendants alleged that they needed additional time to investigate the authenticity of Burns' Exhibit T, discussed previously, and to compel Burns to appear for a deposition, which he failed to do despite several motions to compel and this Court's Orders directing him to comply with discovery.

Since the Court's Order did not spell out that discovery was open to the PCO Defendants only (even though that was the intention, since the Order granted the PCO's Defendants' Motion to Extend Discovery, for the reasons stated by the PCO Defendants), Burns served several requests for admissions and interrogatories on all Defendants. Burns then filed several motions

[49] Burns actually filed a Motion for Partial Summary Judgment on Counts 10-12 (Trade Libel) and on Count 14 (Conversion). Burns claims that these Counts "present threshold questions on operative facts that are independent of the operative facts of plaintiff's claims under R.I.C.O. and the Sherman Antitrust Act," which would "need to be adjudicated only if the above-described issues are decided against plaintiff, and if they are not it would be a waste of judicial time and effort for this court to adjudicate the far more complicated R.I.C.O. and Antitrust issues which would in that event be reduced to hypothetical questions" [sic]. For the reasons stated above, Burns' Motion is denied with prejudice.

under Federal Rule of Civil Procedure 36 to have his requests for admissions be deemed admitted, arguing that Defendants failed to properly object to his discovery efforts.

The PCO Defendants timely and properly objected to Burns' requests on several grounds, including vagueness. Burns requested that the PCO Defendants admit that on October 24, 2002, their counsel told this Court that PCO had contacted the certified public accountant for Lavender and reviewed Lavender business documents. Burns requested the name and address of this accountant, identification of the reviewed business documents, and asked whether this accountant has any knowledge supporting the PCO Defendants' claim "that certain documents filed with the U.S. District Court may have been fabricated." Review of the transcript of the October 24, 2002 hearing held by this Court indicates that counsel for the PCO Defendants did state that in the course of investigating Burns' claims of misbranding, PCO contacted Lavender's outside accountant. Review of the record also shows that Lavender has only one outside accountant, Christopher P. Fortugno, and all parties are aware of his identity.

Even if the PCO Defendants contacted some other accountant, Burns does not explain why he failed to request this information during the original discovery period, which ended on August 19, 2004.[50] Further, the entire dispute is irrelevant because it is premised on Burns' mischaracterization of the PCO Defendants' claim of fabrication. The PCO Defendants allege that Burns' Exhibit T, a letter allegedly written by Defendant Zuck, is a forgery. Zuck filed an affidavit in support of this claim. Burns' reasons for thinking that Lavender's accountant has any independent knowledge of Zuck's signature are a mystery to the Court. Finally, this discovery dispute is moot

[50] The Court's Order dated July 19, 2004, granted Burns' request to extend discovery by one additional month.

because even if the PCO Defendants provided requested admissions and answers, they would not alter the Court's analysis of Burns' claims.

Helen and Kathryn Lamb also timely objected to Burns' requests on the grounds that discovery was closed as to them. While the Court's Order did not specifically limit extended discovery to the PCO Defendants, Helen and Kathryn Lamb's objection appears to be made in good faith. Among information requested by Burns are admissions as to Helen and Kathryn Lamb's residency (this Court has pointed out on numerous occasions that there is no open issue as to their residency, nor is it relevant to Burns' claims), admissions that they are the same people as the ones listed on documents held to be forgeries by the Delaware Courts, and authentication of Helen Lamb's American Express account charges, which, even if found to be true and correct copies, would not provide support for any of Burns' claims.

There is no evidence indicating that Marjorie Lamb objected to or answered Burns' requests for admissions. However, review of Burns' requests shows that they concern matters already addressed by this Court (such as the physical location of Lavender and Helen Lamb's house, Judge Conner's alleged financial interest in Lavender and documents deemed to be forgeries by the Delaware courts, etc.).

None of Burns' recently filed discovery motions would alter the Court's reasoning for dismissing his claims. More importantly, even if these motions were granted, they do not raise material issues of fact which would preclude the Court from granting summary judgment on all of Burns' claims. Therefore, Burns' recently filed discovery motions are denied as moot.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS J. BURNS, **Plaintiff**	:	
v.	:	**CIVIL ACTION** **NO. 01-7019**
LAVENDER HILL HERB FARM, INC. et al., **Defendants**	:	

O R D E R

AND NOW, this 28th day of April, 2005, upon consideration of Defendants Pennsylvania Certified Organic and Leslie Zuck's Motion for Summary Judgment [Doc. #131], Plaintiff Thomas Burns' Motion for Partial Summary Judgment [Doc. #132], Defendants Lavender Hill Herb Farm, Inc., Marjorie S. Lamb, Helen Nicholson Lamb, and Kathryn Elizabeth Lamb's Motion for Summary Judgment [Doc. #138], Defendants Pennsylvania Certified Organic and Leslie Zuck's Motion for Hearing under Rule 104 [Doc. #157], Plaintiff's Motions Pursuant to Rule 36(a) [Doc. ##158, 160, 161, 168], Plaintiff's Motion to Enlarge Time to Respond to Motion for Rule 104 Hearing [Doc. #169], Plaintiff's Motion to Compel Production of Documents [Doc. #170], and Plaintiff's Motion to Strike Defendants Helen and Kathryn Lamb's Motion to Enlarge Time to Answer [Doc. #178], it is hereby **ORDERED** as follows:

1. Defendants Pennsylvania Certified Organic and Leslie Zuck's Motion for Summary Judgment [Doc. #131] is **GRANTED** and Plaintiff's claims against Pennsylvania Certified Organic and Leslie Zuck are **DISMISSED WITH PREJUDICE**;

2. Plaintiff's Motion for Partial Summary Judgment [Doc. #132] is **DENIED**

WITH PREJUDICE;

3. Defendants Lavender Hill Herb Farm, Inc., Marjorie S. Lamb, Helen Nicholson Lamb, and Kathryn Elizabeth Lamb's Motion for Summary Judgment [Doc. #138] is **GRANTED** and Plaintiff's claims against Lavender Hill Herb Farm, Inc., Marjorie S. Lamb, Helen Nicholson Lamb, and Kathryn Elizabeth Lamb are **DISMISSED WITH PREJUDICE**;

4. Defendants Pennsylvania Certified Organic and Leslie Zuck's Motion for Hearing under Rule 104 [Doc. #157] is **GRANTED IN PART** and **DENIED IN PART**. It is specifically **ORDERED** that Defendants Pennsylvania Certified Organic and Leslie Zuck's Motion for Hearing under Rule 104 is **DENIED**, and their Motion to Strike Plaintiff's Exhibit T is **GRANTED**. Defendants Pennsylvania Certified Organic and Leslie Zuck are hereby **GRANTED LEAVE** to file a motion for reasonable costs incurred in bringing their Motion for Hearing under Rule 104, within ten (10) days from this Order. Plaintiff is **GRANTED LEAVE** to reply thereto, within seven (7) days from the service of such motion;

5. Plaintiff's Motions Pursuant to Rule 36(a) [Doc. ##158, 160, 161, 168] are **DENIED AS MOOT**;

6. Plaintiff's Motion to Enlarge Time to Respond to Motion for Rule 104 Hearing [Doc. #169] is **DENIED AS MOOT**;

7. Plaintiff's Motion to Compel Production of Documents [Doc. #170] is **DENIED AS MOOT**;

8. Plaintiff's Motion to Strike Defendants Helen and Kathryn Lamb's Motion to

Enlarge Time to Answer [Doc. #178] is **DENIED AS MOOT**;

9. Plaintiff's Amended Complaint is **DISMISSED WITH PREJUDICE**;

10. The Clerk of the Court shall mark this case **CLOSED** for statistical purposes.

It is so **ORDERED**.

BY THE COURT:

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CYNTHIA M. RUFE, J.